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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 726

THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioner*,

v.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, DEBTOR, GUY A. THOMPSON, TRUSTEE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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The Order of Railroad Telegraphers prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on January 10, 1956.

OPINIONS BELOW

The opinion of the District Court, its Findings of Fact, and its Conclusions of Law are in the record.

R. 17, 21, 25. The opinion of the Court of Appeals (App. 1a), has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956. The jurisdiction of this Court is invoked under section 1254(a) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether, under section 3, First, (j) of the Railway Labor Act (45 U.S.C., sec. 153, First, (j)), providing that the National Railroad Adjustment Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes", in a dispute arising from a claim that a carrier has violated a collective bargaining agreement by assigning work contrary to the provisions of the agreement, notice is required to persons who are neither claimants nor carriers and are not parties to or governed by the collective bargaining agreement.

2. Whether, in the event the answer to question 1 is in the affirmative, actual knowledge of the proceeding by the others allegedly required to be given notice satisfies such requirement.

3. Whether, in the event the answer to question 1 is in the affirmative, failure to give such notice renders any award void.

4. Whether, in the event the answer to question 1 is in the affirmative, the carrier, which is given notice, may challenge the validity of the award for lack of notice to others.

5. Whether, in the situation posed in question 1, in a suit under section 3, First, (p) of the Railway Labor Act, to enforce an award of the Adjustment Board, there are any indispensable parties other than the parties to the submission before the Adjustment Board.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C., §§ 151 et seq.) are set forth in the appendix.

STATEMENT

This action was brought by The Order of Railroad Telegraphers (hereinafter referred to as the "Telegraphers") against the respondent railroad (hereinafter referred to as the "Carrier") to enforce an award and order of the National Railroad Adjustment Board. (R. 4.) Such action is a special statutory proceeding specifically provided for by section 3, First, (p) of the Railway Labor Act as amended (Act of June 21, 1934, c. 691, sec. 3, 48 Stat. 1189; U.S.C., Tit. 45, sec. 153, First, (p)).

Telegraphers organization is the duly authorized collective bargaining representative under the Railway Labor Act of the class or craft of employees commonly known as "Telegraphers" employed by the Carrier. (R. 21.) In such capacity it filed a claim with the National Railroad Adjustment Board, Third Division, that certain work at Anchorage, Louisiana, subject to the collective bargaining agreements between the Telegraphers and the Carrier, had been assigned by the Carrier other than as provided in such agreements. This claim resulted in Award 4734 of the Board, dated February 28, 1950, sustaining the Telegraphers' claim,

and an accompanying order directing the Carrier to make the award effective. (R. 7, 10; Exh. A to Complaint following R. 8.) The Carrier refused to comply with the award and order of the Board, and this suit was brought. (R. 7, 10.)

There was no dispute concerning the material facts, which were established by the Complaint (R. 4), the Amended Answer (R. 9), pretrial proceedings (R. 15), and a subsequent stipulation (R. 16). The Amended Answer set forth several affirmative defenses only one of which was passed upon by the District Court. The substance of this defense, which was sustained by that Court, was that the award and order of the Board upon which the suit was predicated were invalid for failure of the Board to give notice and opportunity to be heard in its proceedings to another labor organization, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the "Clerks"). (R. 11, 17, 26.)

This case, and the Telegraphers' claim giving rise to it, are sequels to the decision of the court below in *Order of Railroad Telegraphers* v. *New Orleans, T. & M. R. Co.*, 156 F. 2d 1 (1946), affirming 61 F. Supp. 869. (R. 16.) The basic issue in this case is best seen in such context. The following facts are established by the opinion of the court below in the prior case and by Award No. 4734 (Exh. A to Complaint, following R. 8):

For many years prior to 1948 the Carrier maintained four positions under the Telegraphers' agreement at Anchorage, Louisiana. In 1943 the Clerks filed a group of claims with the Third Division of the Adjustment Board contending that the assignment of clerical

work to positions covered by the Telegraphers' agreement violated the terms of the collective bargaining agreements between the Carrier and the Clerks. When these claims were pending before the Board the Telegraphers sought to intervene and be heard before the Board in order to protect their right to perform such work under their agreement. The Board denied intervention and opportunity to be heard on the part of the Telegraphers on the ground that it had jurisdiction only to adjudicate the dispute between the Clerks and the Carrier as to the interpretation and application of the Clerks' agreement, a matter in which the Telegraphers were not involved. The Clerks' claims resulted in Award Numbers 2253 to 2258, inclusive, sustaining the claims.

The Telegraphers thereupon brought suit in the United States District Court for the Eastern District of Missouri against the Carrier and the Clerks, contending in Count II of the Petition that the Awards sustaining the Clerks' claims were invalid because rendered without opportunity to the Telegraphers to be heard in the proceeding, and therefore seeking to enjoin the Carrier and the Clerks from putting the Awards into effect. The District Court denied relief and dismissed the Complaint, approving the reasoning of the Adjustment Board to the effect that any showing the Telegraphers might have been able to make that their agreement covered the work in question would not govern the interpretation of the Clerks' agreement, the only question before the Board and within its jurisdiction. Upon appeal the Court of Appeals likewise approved the reasoning of the District Court and of the Adjustment Board. That Court further said: "Even though the ORT were not permitted to inter-

vene in the proceedings brought by the BRC involving its contract with the carriers, it still has a right under the Act to commence a proceeding against the carriers and to obtain an order of the Adjustment Board, interpreting and applying its own contract with them." However, in light of what this Court had said in *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, the Court of Appeals vacated the judgment of dismissal and instructed the District Court to stay its decision until a reasonable opportunity was given for an application to the Adjustment Board for an interpretation of the Telegraphers' agreement.

As of that time the Telegraphers had no grievance nor any dispute with the Carrier as to the proper interpretation and application of the Telegraphers' agreement. Employees subject to the Telegraphers' agreement were continuing to perform the work in question and the Carrier continued its refusal to put Awards Numbers 2253 to 2258, inclusive, into effect. Consequently no claim was or could be submitted to the Adjustment Board at that time involving the Telegraphers' agreement. Thereafter, on June 22, 1947, the District Court entered an order finally dismissing the case.

For some time thereafter the Carrier continued to apply the Telegraphers' agreement as it had theretofore been applied and did not make Awards Numbers 2253 to 2258, inclusive, effective. However, on February 23, 1948, in the course of putting those Awards into effect the Carrier unilaterally reclassified the position of star (*) agent at Anchorage, Louisiana, to agent-telegrapher, removed from that position all the clerical work formerly performed therein and assigned it to a

newly created position of cashier covered by the Clerks' agreement; at the same time it abolished the first trick telegrapher-clerk's position and assigned the work of that position to the reclassified position of agent-telegrapher.

These actions, the Telegraphers claimed, violated the terms of the collective bargaining agreements between the Carrier and the Telegraphers. Failing to secure adjustment of this claim through handling on the property the claim was submitted to the Third Division of the Adjustment Board. The Board was fully informed as to the prior history, including the rendition of Awards Numbers 2253 to 2258, inclusive, holding the clerical work in question to be covered by the Clerks' agreement, and the prior litigation pertaining thereto. The Board concluded, upon examination of the agreements between the Carrier and the Telegraphers, that the Carrier's action had violated those agreements and directed that the position of the star (*) agent and the position of first trick telegrapher at Anchorage be restored under the Telegraphers' agreement and that all employees adversely affected by the violation of the agreements be restored to their former positions and be reimbursed for compensation lost through the violation, not, however, including the expenses claimed. This was Award Number 4734; when the Carrier refused to comply with the order of the Board to make it effective this suit was brought.

It is stipulated (R. 16) that during the pendency of the proceedings before the Adjustment Board the Board gave no notice to the Clerks' organization or to any members thereof respecting the pendency of the Telegraphers' claim; that neither the Telegraphers nor

the Carrier requested the Board to give such notice; that the Clerks did have actual knowledge of the pendency of the proceedings and did not ask leave to intervene or otherwise appear therein; and that it was not the policy or practice of the Board to permit persons or organizations whose relationship to the controversy was like that of the Clerks' organization or the employees represented by it to intervene or to notify them of the pendency or hearing of such proceedings before the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred

1. In holding that Award 4734 in favor of the Telegraphers was invalid and unenforceable because notice of the Adjustment Board proceedings had not been given to the Clerks.

2. In failing to hold that any requirement of notice to the Clerks concerning the Adjustment Board proceedings was satisfied by the Clerks' actual knowledge of the proceedings.

3. In holding that the Clerks were indispensable parties to the action to enforce the Award and Order of the Adjustment Board.

REASONS FOR GRANTING THE WRIT

The issue underlying all the questions presented in this case is the same as the basic issue in *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, 370, in which case this Court granted certiorari. In that case, this Court found the basic issue "a perplexing problem" (p. 370) raising "perplexing questions." (P. 372.) However, "their difficulty" admonished this Court "to

observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." (Pp. 372-3.) In the *Whitehouse* case, this Court therefore reversed the lower Court for error in deciding less contentious issues.

Here we have the same basic issue, raising the same "serious questions concerning the administration of the Railway Labor Act", but this time presented more nakedly. Here, every question presented involves the basic issue: in the situation presented both here and in the *Whitehouse* case, were the Clerks "employees involved" within the meaning of section 3, First (j) of the Railway Labor Act? That issue has given rise to considerable litigation, and its lack of definitive resolution has resulted in considerable turmoil and administrative frustration.

This case and its antecedent proceedings accentuate the confusion of the lower courts concerning the functioning of the Railway Labor Act, the inconsistency of the rulings below, and the necessity of a definitive interpretation of section 3, First, (j) of the Railway Labor Act.

When the claim of the Clerks, that certain work had improperly been assigned by being assigned other than as provided in the Clerks' agreement, was pending before the Adjustment Board, the Telegraphers sought to intervene in the proceedings before the Board because the work in question was being performed as part of a position under the Telegraphers' agreement. Intervention was denied, and both courts below held that not only were the Telegraphers not a necessary party to the Clerks proceeding but that they could not

properly be permitted to become a party. *Order of R. Tel.* v. *N. O. T. & M. R. Co.,* 61 F. Supp. 869, affd. 156 F. 2d 1. Yet when the Telegraphers submitted a claim to the Board alleging that the identical work was improperly assigned because assigned other than as provided in the Telegraphers' agreement, the same courts held the resulting award to be void because the Clerks had not been given opportunity to participate in the proceeding, and that a suit to enforce the award was defective because the Clerks were indispensable parties and had not been joined.

The confusion of the Court below is shown further by its ruling in the earlier proceeding that the proper procedure was for the Telegraphers to submit to the Adjustment Board the question whether its contract covered the work. Such a procedure was impossible under the Railway Labor Act. That Act provides for parties to submit to the Board disputes between railroads and employees. At that time there was no dispute between the Telegraphers and the Carrier, for the Telegraphers contended the work was governed by its contract, and the Carrier agreed and assigned the work accordingly. It was impossible in such situation for the Telegraphers "to commence a proceeding against the carriers." App. 13a.

With respect to the issue of whether, assuming that in the situation involved here the Act required notice to the Clerks, such requirement was satisfied by the Clerks having actual knowledge of the proceedings, the decisions of the Courts of Appeals are in conflict. In *Estes* v. *Union Terminal,* 89 F. 2d 768 (8th Cir.. 1937); *Hunter* v. *A. T. & S. F. Ry. Co.,* 188 F. 2d 294 (7th Cir., 1951), cert. den. 342 U. S. 819, reh. den. 342 U. S. 889;

and *Kirby* v. *Penna. R. Co.,* 188 F. 2d 793 (3d Cir., 1951), the Courts of Appeals for the Third, Seventh, and Eighth Circuits held that where notice to third parties of a claim before the Adjustment Board was required, such requirement was satisfied if the third parties had actual knowledge of the proceeding. In the *Whitehouse* case, the Court of Appeals for the Seventh Circuit held that the existence of a policy of the Board, of which the Court was theretofore unaware, not to permit parties to appear before it who had not had formal notice, required a contrary holding. On review in that case, this Court did not reach that issue. In this case, although the point was briefed and argued below, the Court below does not directly discuss it, although the result is the same as though it agreed with the Court of Appeals for the Seventh Circuit. It is difficult to understand how the existence of a policy, as distinguished from its application, can constitute reversible error. See *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33; *Yakus* v. *United States,* 321 U.S. 414, 434, 436.

The confusion of the various courts has resulted in frustrating the operation of the Railway Labor Act in this type of situation. There has been frequent resort to the courts over this procedural question without any definitive ruling. Many such cases are now pending in various federal courts. Many more claims of this type are pending before the Adjustment Board with little hope of disposition until the basic question in this case is finally resolved. And an unknown but very large number of claims are not submitted to the Board because of uncertainty over this question, and thus remain as unsettled grievances and sources of friction between unions and railroads. The result is turmoil when a dis-

pute of this nature arises. It is important to the administration of the Railway Labor Act that this question be resolved.

CONCLUSION

The basic issue in this case is the same as the basic issue in *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, but which this Court found it unnecessary to resolve in disposing of the *Whitehouse* case. The lack of definitive resolution of that issue has resulted in a multiplicity of lawsuits and the frustration of the functioning of the Railway Labor Act with respect to certain types of claims submitted to the National Railroad Adjustment Board. A resolution of that issue is necessary if the Railway Labor Act is to function as Congress intended.

Respectfully submitted,

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